

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DENNIS ALLEN, MARY JANE
CRACRAFT, LELAN LITTRELL and
GLASS, MOLDERS, POTTERY, PLASTIC
AND ALLIED INDUSTRIAL WORKERS,
LOCAL NO. 41, AFL-CIO,

Plaintiffs,

vs.

LEONARD D. KRISTAL, and JOHN L.
CRARY,

Defendants.

JOHN L. CRARY,

Cross-Claimant,

vs.

LEONARD D. KRISTAL,

Cross-Defendant.

JOHN L. CRARY,

Third-Party Plaintiff,

vs.

POLLY JONES, SHIRLEY MONROE,
JAMES THELAN,

Third-Party Defendants

Case No: C-1-01-159

Judge Herman J. Weber
Magistrate Judge Timothy S. Hogan

DEFENDANT JOHN L. CRARY'S
MOTION TO REVIEW THE
MAGISTRATE'S FINDINGS,
RECOMMENDATIONS AND REPORT

1 Defendant John L. Crary (“Crary”) respectfully submits his Motion to Review the
2 Magistrate’s Findings, Recommendations and Report dated October 22, 2004 (the
3 “Report”).

4 **I.**

5 **ISSUES PRESENTED**

6 1. The Report properly concludes that Glass, Molders, Pottery, Plastic and
7 Allied Industrial Workers, Local No. 41, AFL-CIO (the “Union”) lacks standing to sue in
8 this case. Crary submits that, therefore, his motion for summary judgment against the
9 plaintiff Union should be granted.

10 2. Contrary to the facts in *Martin v. Schwab*, 1992 WL 296531 (W.D. Mo.
11 1992), where the board of a corporation appointed the ERISA fiduciary, the Board of
12 Directors of The Lassen Companies, Inc. (“Lassen”) never appointed Leonard D. Kristal
13 (“Kristal”) as the fiduciary to the Lassen health plan, Lassen Group Benefit Plan, or
14 401(k) plan (collectively the “Plans”). In the absence of such appointment, Crary
15 submits that he, as an individual director, had no knowledge that he should monitor a
16 fiduciary and no power to replace such fiduciary, and therefore had no duty here to
17 supervise Kristal relative to Kristal’s alleged ERISA management.

18 3. The Court properly disregarded most of plaintiffs’ improper evidence.
19 However, the Court in at least three places “inferred” or “supposed” what evidence might
20 be offered at some point in the future, and should not have done so. Plaintiffs have
21 completed their discovery and have failed to offer sufficient evidence of the existence of
22 a genuine issue of material fact. Therefore, Crary’s motion for summary judgment
23 should be granted.

24 4. Finally, Crary submits that plaintiffs have offered no specific facts
25 sufficiently showing that (i) Crary knew that Kristal was an ERISA fiduciary, or that (ii)
26 Crary knew Kristal was misusing ERISA funds. Either one of these failings is grounds
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1 for summary judgment. Crary respectfully submits that, on the whole, plaintiffs have
2 submitted insufficient facts showing the existence of any genuine issue of material fact
3 on either of these issues and, since both issues are necessary to plaintiff's case, the
4 absence of either one is grounds for granting Crary's motion for summary judgment.

5 II.

6 **STATEMENT OF RELEVANT FACTS**

7 On October 22, 2004, Magistrate Judge Hogan issued his Report and
8 Recommendation denying both Crary's and plaintiffs' motions for summary judgment.
9 The Court concluded that the Union lacks standing to sue in this case, but it failed to rule
10 specifically on Crary's summary judgment motion against the Union; instead it generally
11 denied Crary's motion.

12 In his Report Judge Hogan addressed each of three arguments made by Crary in
13 his summary judgment motion. First, Crary presented his argument against the claim for
14 breach of ERISA fiduciary duty. Crary argued that he was not an ERISA fiduciary
15 because (i) he was not the named fiduciary to the Plans; and (ii) neither he nor the Lassen
16 Board actually appointed Kristal as a fiduciary to the Plans. Therefore, the obligation of
17 supervising Kristal as an ERISA fiduciary should not be imposed on Crary or the Board.
18 (See Crary's Motion for Summary Judgment, page 7, line 22-23; page 9, line 16-17; page
19 10, lines 4-14)

20 In the Report, Judge Hogan says on page 6 that "[i]f the Board appointed Kristal
21 and possessed the power to remove him, then each member of the Board had a duty to
22 exercise prudent supervision of him relative to each transaction subject to ERISA."

23 However, there is no evidence at all before this Court that the Board appointed
24 Kristal *as an ERISA fiduciary*. The only evidence is that the Board appointed Kristal as
25 CEO. The Report is not clear about this appointment and, therefore, should be clarified.

1 The only evidence before the Court is that the Board appointed Kristal as CEO, and not
2 as an ERISA fiduciary.

3 Apparently based on the faulty assumption that the Board of Directors of Lassen
4 appointed Kristal as the ERISA fiduciary to the Plans, the Court erroneously applied the
5 prudent person standard and concluded that an individual director had a duty to exercise
6 prudent supervision of Kristal relative to each transaction subject to ERISA. (See Report
7 at 6) But there is no such evidence before this Court.

8 Second, Crary argued for summary judgment on the claim against him for breach
9 of co-fiduciary duty. Crary argued that he had no actual or constructive knowledge of
10 Kristal's ERISA fiduciary status or Kristal's breach thereof. The Court analyzed three
11 pieces of evidence presented by plaintiffs: (i) Randy Pickering's purported phone calls to
12 Crary which were objectively shown to have never actually been made, (ii) Crary's
13 conversation with Randy Pickering concerning a subrogation issue relating to an
14 automobile accident suffered by Crary's wife, and (iii) Lindermuth's hearsay.

15 The Court properly disregarded all the foregoing evidence. The only "damaging"
16 evidence noted by the Court was Crary's own testimony that he took no steps to insure
17 that Kristal was performing his fiduciary duties with respect to the Plans. (See Report at
18 7)

19 However, Crary's deposition testimony clearly established that he did not find out
20 Kristal was the ERISA fiduciary to the Plans and that he did not find out about the
21 alleged breach until Crary was served a copy of the complaint in this case. (See Crary
22 deposition, at page 42-43). In fact, Kristal's own testimony indicates that Kristal did not
23 even know that he was an ERISA fiduciary while he was acting as such. If Kristal did
24 not know he was an ERISA fiduciary and the Lassen Board never appointed him as such,
25 then there is absolutely no evidence here that Crary knew Kristal was a fiduciary. The
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1 fact that Crary may know as much now is insufficient to show that he had any obligation,
2 at the time of Kristal's malfeasance, to supervise Kristal.

3 Finally, Crary argued that he did not engage in any prohibited transaction under
4 ERISA. The Court analyzed the following evidence presented by plaintiffs: (i) Crary
5 allegedly participated in negotiating a collective bargaining agreement with the Union,
6 and (ii) Kristal's deposition testimony. Following the holding in *Sengpiel v. B.F.*
7 *Goodrich*, 156 F.3d 660 (6th Cir. 1998), the Court properly concluded that "Crary did not
8 fall within the ERISA definition of a fiduciary simply because a collective bargaining
9 agreement that he participated in negotiating might have some affect upon an employee
10 benefit plan." (See Report at 7)

11 With respect to Kristal's testimony, the Court commented that it was
12 "circumstantial" and unspecific as to "when and how Crary was told about the fact that
13 earmarked deductions were being diverted to pay corporate bills other than medical
14 insurance." (See Report at 7-8)

15 Crary submits that this lone piece of unspecific evidence is insufficient to save
16 plaintiffs from summary judgment, as more fully set forth herein.

17 III.

18 ARGUMENT

19 A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT.

20 In a summary judgment procedure, the function of the Court is to determine
21 whether there is a "genuine issue as to any material fact and [whether] the moving party
22 is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has
23 the initial burden of showing the absence of a genuine issue of material fact as to an
24 essential element of the non-movant's case; however, it need not support its motion with
25 evidence disproving the non-moving party's claim. *Tregoning v. American Community*
26 *Mut. Ins. Co.*, 12 F.3d 79, 81 (6th Cir.1993) (quoting *Celotex Corp. v. Catrett*, 477 U.S.

1 317, 321 (1986)).

2 If the moving party meets this burden, then the non-moving party “must set forth
3 specific facts showing there is a genuine issue [of fact] for trial.” Fed.R.Civ.P. 56(e).
4 There is no genuine issue for trial unless there is sufficient evidence favoring the non-
5 moving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby*, 477
6 U.S. 242, 248 (1986). Conclusory allegations, however, are not sufficient to defeat a
7 motion for summary judgment. *McDonald v. Union Camp. Corp.*, 898 F.2d 1155, 1162
8 (6th Cir.1990).

9 A party may move for summary judgment by demonstrating that the opposing
10 party will not be able to produce sufficient evidence at trial to withstand a directed
11 verdict motion. See *Southwest Ohio Reg’l Council of Carpenters & Joiners of Am. V.*
12 *Schaefer*, 267 F. Supp. 2d 813 (S.D. Ohio 2003).

13 Although a genuine issue of material fact will defeat summary judgment; the
14 moving party need not support its motion with evidence disproving the non-moving
15 party's claim, but need only “‘show[]’ -- that is, point[] out to the district court -- that
16 there is an absence of evidence to support the nonmoving party's case.” *Celotex Corp. v.*
17 *Catrett* , 477 U.S. at 325. Here, Crary does not need to disprove plaintiffs’ case, but
18 rather need only show that plaintiffs have not established sufficient evidence to support
19 their case.

20 The pivotal question is whether the party bearing the burden of proof has
21 presented a jury question as to each element of its case. *Celotex*, 477 U.S. at 322. The
22 plaintiff must present more than a mere scintilla of evidence in support of his position;
23 the plaintiff must present “evidence on which the jury could reasonably find for the
24 plaintiff.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). “The ‘mere
25 possibility’ of a factual dispute is not enough.” *Mitchell v. Toledo Hosp.* , 964 F.2d 577,
26 582 (6th Cir. 1992) (quoting *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir.

1 1986)). Crary submits that hearsay and testimony concerning a telephone call which is
2 unsupported by the witnesses own telephone records are mere “scintilla’s of evidence”
3 and are insufficient to overcome the burden on plaintiff to produce admissible evidence.
4 For example, there is no question for the jury as to whether Crary knew that Kristal was a
5 fiduciary; it is undisputed that he did not know.

6 Speculation, unsupported by facts in the record, is insufficient to create a genuine
7 issue of material fact and falls short of what is required to survive summary judgment.
8 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Here, plaintiffs hope for
9 speculation of what might have been, except discovery is over and they have failed to
10 raise any specific facts which confirm such speculation or which support their case.

11 The moving party may merely rely upon the failure of the non-moving party to
12 produce any evidence which would create a genuine disputer for the jury. Essentially, a
13 motion for summary judgment is a means by which to ‘challenge the opposing party to
14 put up or shut up on a critical issue.’ *Cox v. Kentucky Dept. of Transp.* 53 F.3d 146, 149
15 (6th Cir. 1995). Plaintiffs have produced such thin admissible evidence in this case that
16 Crary is entitled to summary judgment and should not be required to defend himself at a
17 trial.

18 “When a motion for summary judgment is made and supported as provided in this
19 rule, an adverse party may not rest upon the mere allegations or denials of the adverse
20 party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided
21 in this rule, must set forth specific facts showing that there is a genuine issue for trial.”
22 Federal Rules of Civil Procedure, Rule 56(e). If the adverse party does not so respond,
23 summary judgment, if appropriate, shall be entered against the adverse party. Offering
24 only conclusory opinions and unauthenticated documents is insufficient.

25 Finally, although the Court is not to assess credibility of specific witnesses, the
26 Court may weigh the evidence presented as a whole to see if it adds up to a plausible
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1 case. While a court must draw all inferences in a light most favorable to the non-moving
2 party, it may grant summary judgment if the record, taken as a whole, could not lead a
3 rational trier of fact to find for that party. *Matusushita Elec. Indus. Co. v. Zenith Radio*
4 *Corp.*, 475 U.S. 574, 587 (1986). Plaintiffs may not just claim the existence of an issue
5 of fact, they need to offer sufficient evidence to support their case such that a trier of fact
6 might rationally agree with them. Then, and only then, might the Court find a genuine
7 issue as to a material fact.

8 In any summary judgment proceeding, the non-moving party will always claim
9 that material facts are in dispute. But whether those facts are material and whether the
10 dispute is genuine or manufactured must be determined by the Court. Crary submits that,
11 on weight, there are no genuine issues of material fact existent here for trial and that
12 Crary should not be made to defend himself on the flimsy facts presented by plaintiffs.

13 **B. CRARY'S MOTION FOR SUMMARY JUDGMENT AGAINST THE**
14 **UNION SHOULD BE GRANTED FOR UNION'S LACK OF STANDING TO SUE**
IN THIS CASE.

15 The Court properly concluded that the Union lacks standing to sue in this case.
16 However, it failed to rule on whether Crary's motion for summary judgment against the
17 Union should consequently be granted, and only denied Crary's motion for summary
18 judgment generally. Crary requests a review of the Report and a ruling which grants his
19 motion for summary judgment against the Union.

20 **C. CRARY, AS AN INDIVIDUAL DIRECTOR, DID NOT HAVE A DUTY TO**
21 **SUPERVISE KRISTAL, THE ERISA FIDUCIARY, AFTER THE LASSEN**
22 **BOARD FAILED TO APPOINT KRISTAL AS THE FIDUCIARY TO THE**
PLANS.

23 In his motion for summary judgment against plaintiffs on the cause of action for
24 breach of ERISA fiduciary duty, Crary argued that he was not an ERISA fiduciary
25 because (i) he was not the named fiduciary to the Plans; and (ii) neither he, nor the Board
26 of Directors of Lassen, appointed Kristal as the fiduciary to the Plans.

1 In both of the cases cited by the Court, *Martin v. Fellen*, 965 F.2d 660 (8th Cir.
2 1992), and *Martin v. Schwab*, 1992 WL 296531 (W.D. Mo. 1992), the board of directors
3 appointed the ERISA fiduciaries; therefore, the board was found to have had the duty to
4 supervise their appointed fiduciaries. Contrary to those two cases, neither Crary nor the
5 Board of Directors of Lassen ever appointed Kristal as the ERISA fiduciary to the Plans.
6 The only evidence here is that the Board appointed Kristal as the CEO and Kristal
7 himself did not know he was an ERISA fiduciary.

8 The Court's ruling that each member of the Board of Directors of Lassen had a
9 duty to exercise prudent supervision of Kristal relative to each transaction subject to
10 ERISA is based on two premises. The first is the appointment of Kristal by the Board as
11 the fiduciary to the Plans, and the second is the Board's power to remove Kristal as the
12 fiduciary to the Plans. (See Report at 6)

13 However, Crary offered uncontroverted evidence that neither he nor the Board of
14 Directors of Lassen ever appointed Kristal as the fiduciary to the Plans (see Crary's
15 Motion for Summary Judgment, page 7, line 22-23; page 9, line 16-17; page 10, lines 4-
16 14). And plaintiffs presented no evidence whatsoever to refute Crary's evidence and no
17 evidence whatsoever that Crary or the Board of Directors of Lassen appointed Kristal as
18 the fiduciary to the Plans. The evidence here is completely uncontroverted that Kristal
19 was not appointed as ERISA fiduciary to the Plans by Crary or the Lassen Board.

20 Consequently, the duty to exercise prudent supervision of Kristal relative to each
21 transaction subject to ERISA should not be imposed on Crary or the Board. (See Crary's
22 Motion for Summary Judgment, page 7, line 22-23; page 9, line 16-17; page 10, lines 4-
23 14). In fact, imposition of such a burden on directors who had nothing to do with
24 appointing an ERISA fiduciary will amount to an absolute burden on all directors to
25 investigate who the potential ERISA fiduciaries are within the company they are
26 directing and find out what they are doing. It will amount to strict liability on directors
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1 for fiduciaries' misdeeds, even if the directors do not find out who the fiduciaries are and
2 even if the fiduciaries themselves do know that they hold such a position (as in this case).

3 This would be a great and, defendant submits, unintended expansion of ERISA
4 liability and would heap further burdens on boards of directors already suffering from
5 severe responsibility. Boards are not, never have been, and should not be guarantors of
6 the corporate management for whom they provide direction.

7 Nor did plaintiffs offer any evidence that an individual director had the power to
8 remove Kristal as the CEO. Crary submits that it is not meaningless if the Court applies
9 the prudent person standard to the Board collectively rather than to individual directors.
10 (Report at 5). At the minimum, the standard would apply where the Board had acted in
11 the first place.

12 Corporations can only take actions through their agents. Boards of directors take
13 action on behalf of a corporation only following discussion and a vote. Applying liability
14 to individual directors places liability where there is no power to take appropriate action.
15 How would such liability apply to an individual director who had disagreed on such a
16 vote and been outvoted? At the heart of it, individual directors are powerless to do
17 anything but dissent and then resign when such dissent is ignored.

18 If a director misses a meeting at which ERISA issues are discussed, would
19 liability follow? If a director votes against an ERISA appointment, would that director
20 still have a duty to monitor the ERISA actions of such fiduciary. What if that ERISA
21 fiduciary, knowing that the dissenting director had been outvoted, refuses or fails to
22 supply any useful information? When is it permissible for that director to resign?

23 The fact is that corporate directors individually have no management power or
24 authority whatsoever. They may individually attempt to tell a Chief Executive Officer
25 what to do, but the CEO may ignore them with impunity. A director's only power is to
26 raise the issue at a Board meeting and hope for a majority.

1 Crary submits that only when a Board takes action appointing an ERISA fiduciary
2 should directors have any arguable obligation to monitor the actions of such ERISA
3 fiduciary; and further submits that, in any such case, resignation should be an appropriate
4 response by a corporate director to the possibility of imposition of such liability.

5 Directors do not run companies; they never have and they should not ever do so.
6 Rather, they set policy. Unless a Board has accepted ERISA responsibility by setting
7 ERISA policy (such as possibly when they appoint ERISA fiduciaries), there should be
8 no resulting ERISA liability.

9 Because conclusory allegations are insufficient to defeat a motion for summary
10 judgment and because plaintiffs have utterly failed to offer any facts showing that Crary
11 or the Board of Directors of Lassen appointed Kristal as the fiduciary to the Plans,
12 Crary's motion for summary judgment should be granted. See *McDonald v. Union Camp*
13 *Corp.*, 898 F.2d 1155, 1162 (6th Cir.1990).

14 **D. THE COURT SHOULD NOT “INFER” OR “SUPPOSE” WHAT**
15 **EVIDENCE MIGHT BE OFFERED; PLAINTIFFS HAVE COMPLETED**
16 **DISCOVERY AND HAVE FAILED TO OFFER SUFFICIENT EVIDENCE IN**
THEIR OPPOSITION TO CRARY’S MOTION FOR SUMMARY JUDGMENT.

17 Once the moving party meets its burden, the non-moving party “must set forth
18 specific facts showing there is a genuine issue [of fact] for trial.” Fed.R.Civ.P. 56(e).
19 Because Crary has presented undisputed material facts in support of his motion for
20 summary judgment, the burden subsequently shifted to plaintiffs to provide specific facts
21 sufficiently showing a genuine issue of material fact as to an essential element of their
22 case.

23 The parties completed discovery before their submission of the moving papers.
24 Plaintiffs have presented all of the evidence they have and made their best argument. If
25 plaintiffs were not able to refute Crary’s evidence or present specific facts sufficiently
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1 showing there is a genuine issue of material fact for trial, Crary's motion for summary
2 judgment should be granted.

3 It is not the Court's job to infer or suppose what evidence might be offered by
4 plaintiffs. On pages 5, 6, and 7 of the Report, the Court apparently predicts what
5 evidence plaintiffs might ultimately provide and what plaintiffs will be arguing. This is
6 impermissible – the Court should decide on the record before it, and solely on that
7 record.

8 As an example of portions of the Report with which Crary takes exception: On
9 page 5 the Report says "[p]laintiffs' response, although not expressed in so many words
10" Crary submits that plaintiffs' arguments should be taken at face value without any
11 further inferences from the Court. If plaintiffs did not use "so many words" and their
12 argument is unclear or not well presented, the Court should read what plaintiffs wrote
13 and not make inferences of what they might have intended.

14 Similarly on page 6 the Report the Court says, "[p]laintiffs seem to argue that it
15 was Crary's fiduciary duty to try" Crary submits that plaintiffs' argument should be
16 read as written and that the Court should not infer arguments which plaintiffs have not
17 actually made.

18 Finally, on page 8 of the Report the Court supposes the "likely" evidence that
19 might come from directors Morris and Kristal. Crary submits that these suppositions and
20 inferences are improper. The parties have presented their evidence and the evidence
21 speaks for itself.

22 For example, the single bit of evidence offered by plaintiffs in an attempt to show
23 that Crary knew Kristal acted as a fiduciary with respect to the Plans is from page 81 of
24 Crary's deposition. (Plaintiffs Combined Proposed Findings of Fact number 25). Yet
25 Crary never says this. He acknowledges that, as CEO, Kristal would run the company
26 and that running the company implies that, if there is a benefit plan, that plan would
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1 come under Kristal's jurisdiction *as CEO*. This jurisdiction could include choosing the
2 ERISA fiduciary, but it does not in any way automatically mean that the CEO will be
3 acting as such fiduciary himself.

4 Following is the exchange which took place at Crary's deposition and on which
5 plaintiffs rely:

6 "Q: When you executed the employment agreement that's
7 been marked as an exhibit between Lassen Companies and Lenn
8 Kristal, did you understand that his duties as CEO would encompass
overall responsibility for the benefit plans offered by the company
to its employees?

9 "A My understanding was that he would be totally in
10 charge of all the operations of the company.

11 "Q And would that include the benefit plans?

12 "A It wasn't addresses specifically, but it would be
implied, sure."

13 This exchange does not *in any way* show that Crary knew Kristal was personally
14 acting as an ERISA fiduciary; the purported "fact" number 25 which plaintiffs claim it
15 shows. It merely means that Crary acknowledged that Kristal, as CEO, was responsible
16 for running the company. This is surely nothing new. That is exactly what CEOs do.

17 Yet Crary knowing that the CEO runs the company does not mean that Crary
18 knew that the CEO was personally acting as an ERISA fiduciary. Running the company
19 might involve selection of a fiduciary, which fiduciary might not even be a company
20 employee. Crary submits that this incredibly loose handling of testimony by plaintiffs
21 and this spin by plaintiffs is endemic to their summary judgment defense. Plaintiff's
22 "facts" are hearsay and wishful thinking which do not actually support their claims, while
23 Crary's facts are supported by multiple witnesses and irrefutable.

24 Similarly, most of the evidence supplied by plaintiffs that they claim shows that
25 Crary knew of Kristal's misdeeds is, even taken in its most favorable light to plaintiffs,
26 really just evidence that Crary *might* have known that Kristal was managing badly. But,
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1 even assuming Crary knew Kristal was managing badly, as shown above there is
2 absolutely no evidence that Crary appointed Kristal as an ERISA fiduciary or even knew
3 that he acted as such. Therefore, Crary was under no obligation to take Kristal's general
4 poor management and somehow connect the dots to arrive at the conclusions that (i)
5 Kristal *might* be an ERISA fiduciary and (ii) *might* be misusing ERISA funds and, (iii)
6 *therefore* Crary should carefully monitor Kristal, or try single-handedly to remove him.

7 Since plaintiffs are unable to present specific facts sufficiently showing a genuine
8 issue of material fact for trial, they will not be able to produce sufficient evidence at trial
9 to withstand a directed verdict motion and summary judgment should therefore be
10 granted.

11 **E. CRARY'S MOTION FOR SUMMARY JUDGMENT SHOULD BE**
12 **GRANTED BECAUSE PLAINTIFFS OFFERED LITTLE CREDIBLE**
EVIDENCE IN THEIR OPPOSITION.

13 In analyzing Crary's ERISA liability, the Court properly disregarded most of
14 plaintiffs' improper evidence. (Report at 6) However, the Court then stated that, "[o]nce
15 over the first hurdle . . ." and continued in its evaluation of certain evidence. Yet Crary
16 does not see how plaintiff has overcome any hurdle here. The evidence submitted by
17 plaintiff includes (i) a claimed telephone call unsupported by the claimant's own
18 telephone records, (ii) a subrogation issue that occurred well before any health plan
19 problems, (iii) a telephone conference with someone other than Crary, and (iv) an
20 unsupported hearsay claim. Crary submits that there is no evidence here and that
21 plaintiffs have not gone over any hurdle.

22 The Court correctly disregarded all of the foregoing improper evidence. The only
23 "damaging" evidence noted is from Crary's own testimony that he "took no steps to
24 insure that Kristal was performing his duties" with respect to the Plans. However,
25 Crary's deposition testimony clearly established that he did not find out that Kristal was
26 the ERISA fiduciary to the Plans and of his subsequent breach until Crary was served a
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1 copy of the complaint in this case, well after his resignation. (See Crary deposition at 42-
2 43) Plaintiffs and the Court both apparently want to require Crary to supervise Kristal
3 even when there is no evidence that (i) Crary or the Lassen Board appointed Kristal as a
4 fiduciary, or that (ii) Crary even knew Kristal was a fiduciary.

5 In fact, Kristal's own testimony indicates that he did not even know of his
6 fiduciary status until he was sued by plaintiffs. The fact that Crary took no steps to
7 supervise Kristal with respect to the Plans supports Crary's assertion that he had no
8 actual or constructive knowledge of Kristal's ERISA fiduciary status and Kristal's breach
9 thereof.

10 Plaintiffs failed to present any evidence whatsoever that Crary had actual or
11 constructive knowledge of Kristal's ERISA fiduciary status, and very, very, little
12 evidence (all of which was controverted) that Crary knew anything of Kristal's breach
13 thereof. Because there is no genuine issue for trial unless there is sufficient evidence
14 favoring the non-moving party for a jury to return a verdict for that party, Crary's motion
15 for summary judgment on the cause of action for breach of co-fiduciary duty should be
16 granted. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

17 With respect to Crary's third argument, that he did not engage in any transaction
18 prohibited under ERISA, the Court addressed the following evidence presented by
19 plaintiffs: (i) Crary participated in negotiating a collective bargaining agreement with the
20 Union, and (ii) Kristal's deposition testimony.

21 Following the holding in *Sengpiel v. B.F. Goodrich*, 156 F.3d 660 (6th Cir. 1998),
22 the Court properly concluded that "Crary did not fall within the ERISA definition of a
23 fiduciary simply because a collective bargaining agreement that he participated in
24 negotiating might have some affect upon an employee benefit plan." (See Report at 7)

25 The only evidence left was Kristal's testimony, and the Court is clearly entitled to
26 weigh this evidence against the competing evidence in the record as a whole. The Court
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1 found that Kristal's testimony as "circumstantial" and unspecific as to "when and how
2 Crary was told about the fact that earmarked deductions were being diverted to pay
3 corporate bills other than medical insurance." (See Report at 7-8) Especially since this
4 is the last bit of evidence offered by plaintiffs, its lack of specificity and its circumstantial
5 nature render it insufficient to prove plaintiffs' case to a trier of fact and overcome
6 Crary's motion for summary judgment.

7 And there is a weight of evidence showing the opposite.

8 Examining plaintiff's purported evidence without regard even to the admissible
9 evidence submitted by Crary shows plaintiffs' flimsy case. Evidence that Crary
10 considered removing Kristal as CEO (Plaintiffs' Combined Proposed Findings of Fact
11 29) does not show that Crary knew Kristal was a fiduciary and did not monitor him.

12 Evidence that Bob Bernet was displeased in Kristal's management (Plaintiffs'
13 Combined Proposed Findings of Fact 34, 35) does not show that Crary knew Kristal was
14 a fiduciary and did not monitor him.

15 Inadmissible hearsay evidence that Crary knew Kristal was misusing ERISA
16 funds (Plaintiffs' Combined Proposed Findings of Fact 31) does not show that Crary
17 knew Kristal was a fiduciary and did not monitor him.

18 Inadmissible hearsay evidence of what director Morris might have known
19 (Plaintiffs' Combined Proposed Findings of Fact 37, 38, and 39) does not show that
20 Crary knew Kristal was a fiduciary and did not monitor him.

21 Plaintiffs' submit such inadmissible evidence as support for their proposed
22 findings of fact because they are trying to confuse and obscure the weight of the
23 evidence, which is that Crary did not know Kristal was a fiduciary and did not
24 specifically know he was mishandling ERISA funds. Rather, the 98 separate statements
25 of undisputed fact set forth by Crary, and the often five and six times instances of
26 evidentiary confirmation of such facts, are a clear contrast to the hearsay support by a
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1 couple of witnesses offered by plaintiffs. In short, a careful examination of the findings
2 of fact submitted by plaintiffs in contrast to the detailed findings of fact submitted by
3 Crary, shows that plaintiffs have no case.

4 The Court also mentioned a laundry list of Kristal's testimony offered by
5 plaintiffs, including that Crary was made aware of the cash flow problems at Lassen and
6 that he held an MBA from Columbia. Plaintiffs tried their best to offer all kinds of
7 irrelevant, improper, hearsay and out-of-context evidence in their opposition to Crary's
8 motion for summary judgment. However, the test for summary judgment motion is not
9 "presence of the evidence" as the Report stated on the bottom of page seven. The Court
10 must evaluate the *sufficiency* of the evidence. Pursuant to Fed.R.Civ.P. 56(e), the non-
11 moving party "must set forth specific facts showing there is a genuine issue [of fact] for
12 trial." Most of Kristal's testimony offered by plaintiffs was irrelevant and circumstantial,
13 as noted by the Court, and none was sufficiently specific as required by Fed.R.Civ.P.
14 56(e).

15 Furthermore, the genuine issue of fact contemplated by Rule 56 must be material
16 *to an essential element of the non-movant's case*. See *Tregoning v. American*
17 *Community Mut. Ins. Co.*, 12 F.3d 79, 81 (6th Cir.1993) (quoting *Celotex Corp. v. Catrett*,
18 477 U.S. at 321) None of Kristal's testimony concerns any material fact as to Crary's
19 alleged fiduciary status, his actual or constructive knowledge of his own fiduciary status,
20 or his knowledge of his own breach or any alleged breach by Crary of any ERISA
21 fiduciary duty. What's more, none of Kristal's testimony or other evidence presented by
22 plaintiffs refutes Crary's evidence – that evidence has never been refuted and, indeed, is
23 irrefutable.

24 A party may move for summary judgment by demonstrating that the opposing
25 party will not be able to produce *sufficient evidence* at trial to withstand a directed verdict
26 motion. See *Southwest Ohio Reg'l Council of Carpenters & Joiners of Am. v. Schaefer*,
27

1 267 F. Supp. 2d 813 (S.D. Ohio 2003) (Rice, J.; emphasis added). Discovery is over in
2 this case, and plaintiffs have presented their very best argument to this Court. Yet,
3 plaintiffs have not shown that Crary or the Lassen Board appointed Kristal as an ERISA
4 fiduciary, that Crary even knew that Kristal was an ERISA fiduciary, or (other than
5 Kristal's unspecific testimony) that Crary knew Kristal was mishandling any ERISA
6 funds. In short, plaintiffs were not able to offer sufficient evidence to show there is a
7 genuine issue of material fact as to any essential element of their case against Crary.
8 This does not add up to Crary having to stand trial and, consequently, Crary's motion for
9 summary judgment should be granted.

10 **IV.**

11 **CONCLUSION**

12 Crary's motion for summary judgment against the Union should be granted since
13 the Union lacks standing to sue.

14 In the absence of appointment of Kristal as the fiduciary to the Plans by Crary or
15 the Board, individual board members have no power to take any action, and should not
16 have a duty to supervise a person who it turns out is a fiduciary.

17 The Court should not "infer" or "suppose" what evidence might ultimately be
18 offered; but should carefully review the evidence actually presented and weigh this
19 evidence to see if a genuine issue of material fact exists for a trial.

20 Finally, since plaintiffs have not shown by admissible factual evidence either (i)
21 that Crary knew that Kristal was an ERISA fiduciary, or (ii) that Crary knew of Kristal's
22 misdeeds, Crary's motion for summary judgment should be granted.

23
24 Dated: November 1, 2004

Respectfully Submitted,

25 */s/ Stephen R. Felson*

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CERTIFICATION OF SERVICE

I hereby certify that on November 1, 2004, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following.

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I further certify that on November 1, 2004, I served the following by ordinary U.S. Mail:

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